89-1280

No. _____

Supreme Court, U.S.
FILED
JAN 11 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1990

SOCORRO GUERRA,

PETITIONER,

- v -

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SOCORRO GUERRA
IN PERSONA
REG. NO. 19220-044
P.M.B. 7007
UNIT: SHAWNEE
MARIANNA, FLORIDA 32446

65 pp

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5246

QUESTION PRESENTED

WHETHER DUE PROCESS REQUIRES THE RECUSAL OF A JUDGE WHERE THERE IS A LIKELIHOOD OR PROBABILITY FOR BIAS, RESULTING FROM INFORMATION LEARNED IN HIS JUDICIAL CAPACITY IN EX PARTE COMMUNICATION THAT THREATS AGAINST HIS LIFE HAVE BEEN MADE BY THE DEFENDANT, AND WHERE JUDGE'S FINDINGS OF FACT DEMONSTRATE AN ABSENCE OF JUDICIAL DETACHMENT.

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PETITIONER,

- v -

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, Socorro Guerra, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on 13 November 1989.

OPINION BELOW

The opinion of the United States District Court for the Southern District of Florida by the Honorable Judge Thomas E. Scott is unreported, and is appended below as Appendix "A"; the opinion of the United States Court of Appeals for the Eleventh Circuit is unreported, and is appended below as Appendix "B".

STATEMENT OF JURISDICTION

The United States District Court entered judgment on March 3, 1989. The United States Court of Appeals for the Eleventh Circuit entered judgment on November 13, 1989. Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254. 1/

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall . . be deprived of life, liberty, or property, without due process of law; . . .
>
> the accused shall enjoy the right to an impartial tribunal . . . .

STATEMENT OF THE CASE

On May 29, 1985, petitioner, Socorro Guerra, was indicted in the Southern District of Florida and charged with conspiracy to possess with intent to distribute cocaine, conspiracy to import cocaine, possession with intent to distribute and importation in violation of 21 U.S.C. §846, 936, 841(a)(1), 952(a), 960(a)(1). A superseding indictment was

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1/ No other petitioner is involved in this petition.

filed on October 2, 1985, which added four co-defendants. On November 15, 1985, petitioner was charged with the portion of the cocaine conspiracy which occurred in Colorado, with consolidation thereof.

On January 7, 1986, petitioner plead guilty to count three of the indictment in the Florida case and count one of the Colorado indictment. She was sentenced to serve 20 years in the Florida case and 15 years in the Colorado case, to run consecutively.

Honorable Thomas E. Scott presided over the proceedings from May 29, 1985 until March 3, 1988.

On July 3, 1986, Guerra filed a Motion to Vacate, or Correct Illegal Sentence alleging inter alia that her attorney, Luis Casuso, had failed to provide competent counsel, had misrepresented the existence of a promise with regard to the sentence and failed to both read the Pre-Sentence Investigation report and present objections to the information contained therein under 28 U.S.C. §2255 and Rule 35 Fed.R.Crim.P.

The District Court ordered an evidentiary hearing on Guerra's motion. A Writ of Habeas Corpus Ad Testificandum was issued to transport Guerra from FCI Pleasanton, Dublin, California to the federal courthouse in Miami, Florida. On February 10, 1987, the writ of habeas corpus ad testificandum was abruptly cancelled by Judge Scott. Before Guerra reached the district, Judge Scott became aware of an alleged plot to "break-out" Guerra in ex parte communications with the U.S. Marshals. As a result of the alleged plot the United States Marhsals Service placed Judge Scott under 24 hour Marshals protection. All further proceedings were held without Guerra's presence. On February 19, 1987, the Court held an evidentiary hearing where Guerra's counsel learned for the first time that the U.S. Marshals Service had heard from the F.B.I. that outlined the alleged plot to "break out" the petitioner by armed Colombian nationals during the hearing and remove Guerra. This was to be accomplished by a hit-team flown in from Colombian. The only witness who testified on the record was inspector Larry Carter of the United

States Marshals Service, who admitted that this knowledge of the alleged plot came from at least second and third-hand hearsay. Inspector Carter did have occasion to speak to the investigating agent but he testified that his testimony was based, at least in part, on information he received from his boss, who had received it from the head of the Miami FBI Office, who had received it from the investigating agent, who had received it from the investigating agent, who had received it from the confidential informant, who may or may not have obtained it directly from the alleged participant in the plan. The investigating FBI agent was unavailable at the time of the preliminary hearing. Inspector Carter could testify only about his assumptions and beliefs, based upon the limited information he had, as to the reliability of the information and Guerra's alleged involvement. Guerra's counsel did not argue that the government should have been required to produce the confidential informant. Rather, the investigating agent himself should be made available for cross-examination about the substance and reliability of the information. Guerra's counsel requested that an additional evidentiary hearing be conducted on

the issue to permit Guerra to confront and cross-examination the FBI agent who investigated these allegations, but the Guerra request was denied. Judge Scott stated on the record that he had been "briefed" "off the record". However, he failed to disclose to the parties the details of that briefing. Inspector Carter was questioned about the nature of the briefing to Judge Scott but since he was not the one who briefed Judge Scott could not provide testimony. Inspector Carter testified that the alleged plot to "break out" received by the FBI Office would be an attempt to break-out Guerra from the custody of the U.S. Marshals, at the airport when she came in, or in the courtroom, to be effectuated "in the most violent manner, i.e., "they would take out [presumably "shoot"] the courtroom staff, witnesses on hand, Marshals and everyone, including the judge and take her out."

Despite the fact that this information was third and fourth hand hearsay, Judge Scott denied counsel's request that the government produce more competent and direct evidence and ultimately denied counsel's request for Guerra to be present at the

hearings. Instead, process was fashioned by which the Court could receive the necessary evidence for the Writ of Habeas Corpus by way of depositions. The testimony about the alleged break-out plot was offered by the Government for the sole purpose of resolving the question of Guerra's presence at the post-conviction motion hearings. The issue appeared to have mooted by the Court's arrangements permitting Guerra's video-taped deposition and the "wrap-around" previous counsel, Luis Casuso depositions. The Court ordered Guerra be deposed while incarcerated and permitted additional access of other material witnesses. Guerra's rights to consult with counsel and to conduct cross-examination were preserved by the Court's permission to take additional deposition of the government's witness against her, her former attorney, after having had the opportunity to review his prior testimony with her current counsel. A hearing on Guerra's motions were held on April 11, 1988. By the time of the April 11, 1988 hearing, it appeared that the issue raised by the "break-out" was moot.

The fact that Judge Scott considered the ex parte information for purposes beyond the resolution of the presence issue did not become apparent until the Memorandum and Opinion was filed.

At the end of the hearing the Court ordered that the parties submit post-hearing Memorandum of Law which were to be filed by May 4, 1988.

In both her Rule 35 Motion and 28 U.S.C. 2255 petition, Guerra charged that her former defense attorney, Luis Casuso, failed to provide competent legal representation as guaranteed by the Sixth Amendment presenting evidence of three separate instances of Casuso's conduct that fell below the standards of professional competence: (1) Casuso misrepresenting the sentence that would be imposed if Guerra plead guilty, (2) Casuso failed to have prepared Guerra's defense, and (3) at sentencing, Casuso refused to present Guerra's objections to the Pre-Sentence Investigation report and further failed to offer evidence and arguments to mitigate the characterization of her culpability contained in the PSI. Casuso's inadequate representation rendered Guerra's guilty plea involuntary. The depositions, relevant documents, pleadings and

testimony of attorney, Luis Casuso, Correctional Officers Lofton and Cavanaugh were presented.

On or about May 29, 1985, Luis Casuso was retained by Socorro Guerra in connection with her pending indictments. From the time he began representing Guerra up through her plea on January 6, 1986, Casuso filed numerous pleadings relating to bond but did not file any pre-trial motions or adopt any of the pre-trial motions filed by any co-defendants of which the docket sheet verified.

The depositions of Guerra consisted of the testimony that Casuso informed her that she had to plead guilty because all of the co-defendants were pleading guilty and cooperating with the government against her. Further Guerra testified that Casuso told her that if she plead guilty she would be given a maximum 10-15 years with release after 4-5 years. That Casuso negotiated a plea agreement with the government for her to plead to Count III in Florida's case and Count II of the Colorado case. In addition, that he [Casuso] told her that he had gotten something valuable by getting a (b)(2) recommendation which was explained to her [Guerra] as the "best thing there was in this country and law." Guerra testified that

Casuso repeatedly promised her that if she plead guilty, that the trial Court would agree to sentence her to 10-15 years and that she would actually serve only 5 years in jail. This was used to induce her into pleading guilty. Guerra was convinced at the time she entered her plea that the sentence she would receive would require her to do no more than 5 years in jail, but did not inform the Court that such a promise existed. Guerra testified that her answers turned out to be in accordance with her attorney's instructions. When Judge Scott asked her, "Are there any type of secret deals that I am not aware of?" she answered "No." Guerra testified that at the time of the plea, her answers were truthful. She believed at that time, based on Casuso's representations to her, that Casuso had adequately represented her and that he had negotiated a plea agreement that would result in five years actual time served. Guerra admitted that her Rule 11 answered turned out to be "white lies", but she explained that they were the product of Casuso's misrepresentations. Further that Casuso cautioned her that if she answered any questions the wrong way, the court would reject her plea and they would have to pick a jury and proceed to

trial right then and there. She explained that she answered in accordance with his instructions and that due to her nervousness and confusion, she didn't listen closely to the court's questions. Guerra testimony was that after the plea was entered, the government's PSI was not read to her by Casuso. Instead, Casuso read to her the private PSI prepared for him [Casuso] by Julio Machado and it characterized the PSI by the government as a "marvelous report" with the recommendation Guerra be given 10-15 years. At sentencing, Judge Scott informed her [Guerra] that he could not go along with the (b)(2) recommendation, but would give her the opportunity to withdraw her plea. The Court took a five minute recess at which time Casuso told her that if she withdrew her plea she would have to go to trial immediately. Guerra entered the plead of guilty at which time Judge Scott pronounced a thirty-five year sentence, Guerra went into shock. Guerra testified that when she confronted Casuso after the sentencing, Casuso calmed her by telling her that he was a close friend of Judge Scott's, and that they had scheduled a luncheon for the next day. That Casuso told

her that he would "fix it" with the judge so that she would get 20 years taken off her sentence.

Casuso testified that he did not review with Guerra discovery provided from the Government such as the tape recorded conversations between defendants (including Guerra) and the confidential informants. Casuso testified that it would have been a "hassle to get a tape recorder in the jail." Casuso did not provide Guerra with any of the transcripts of the tape recorded conversations. Casuso testified that he never played for Guerra her tape-recorded conversations. That he never gave her copies of the transcripts of the tapes. Casuso explained his lack of complete preparation of the case by giving the testimony that most of the tapes were of other people and did not see fit that Guerra review them. Casuso's testified that he believed that Guerra's only chance other than pleading guilty was to get out on bond and flee. Casuso attempted to obtain bond up to 3 days before date of trial. Casuso stated that he instructed Guerra how to answer the Rule 11 colloquy in order to get her plea accepted by the court. Casuso testified that he cautioned her that if she answered any of the questions the wrong way, the court would reject

the plea and they would have to pick a jury and proceed to trial then and there. Casuso's stated that there were misrepresentations to Guerra as to how he achieved a favorable result by getting her a (b)(2) recommendation from the prosecutor. He testified that owing personal feelings to Guerra, he was reluctant to disappoint her by telling her how much time she reasonably could expect to serve. Casuso confirmed that Guerra was unable to appreciate or understand the reality of the potential sentence she was facing. Casuso confirmed that he met with Bernardo Diaz to corroborate the drug seizures by the Government so that co-conspirators could access relative financial liabilities. Casuso testified that he had previously represented Mr. Diaz in an unrelated case. Casuso concluded that Guerra's position in the case was hopeless and she had no choice but to plead guilty on the charges. Casuso had determined from his review of discovery materials and his discussions with Guerra that several of Guerra's co-defendants, [Rex Ryland, Gilberto and Maria Diaz and a third co-defendant who received 7 years sentences prior to Guerra's sentencing] [all of whom received a less time than Guerra, had greater degrees of culpability.]

Casuso recognized in reaching its sentence the reliance of the characterization of Guerra's greater culpability contained in the PSI. Yet he made no attempt to dispute the characterization that both he and his client considered erroneous. Casuso testified that he omitted at least one section when he read the report to Guerra. He had no recollection of reading to Guerra the section describing her as being the most culpable defendant in the United States end of the drug operation. Casuso testified that he and Guerra discussed the reduction of the sentence in Officer Lofton's presence, but he denied that he told Guerra that the sentence would be reduced. Casuso confirmed that Guerra believed up to the time of sentencing that she would not be imprisoned to more than five years. Casuso testified that a meeting occurred between himself and Guerra the day after sentencing at the jail with Officer Lofton present.

The depositions of two independant witnesses: Dade County Correctional staff Lofton & Cavanaugh testimony corroborated Guerra's claim that Casuso repeatedly promised her a sentence of 10-15 years, with 5 years actual time served in jail. Officer Lofton testified under oath at the hearing that she

was a correctional officer at the Dade County Detention Center during the time Guerra was there. Officer Lofton saw Guerra on a daily basis, during which times Guerra often confided in her feelings. Officer Lofton testified that Guerra was "obsessed" with a guaranteed 5 year limit of imprisonment. Officer Lofton testified that following Guerra's sentencing she was present at a meeting between Casuso and Guerra, at which time Casuso made further promises to Guerra that he had "taken care of" a reduction of sentence and Mrs. Guerra would actually serve a 5-year period. Officer Lofton testified that Guerra's daughter was present at the meeting. Officer Cavanaugh testified that she would see Guerra daily and Guerra confided in her. Officer Cavanaugh testified that Guerra confided in her that her [Guerra] attorney told her that if she entered a guilty plea she would only be facing five years in jail. Officer Lofton testified that unwittingly she added to the problem when [Lofton] explained to Guerra that Casuso must have gotten "someone's" agreement to the terms before advising her to accept the plea offer. Officer Cavanaugh and Lofton confirmed that Guerra remained steadfast in her belief up to the time of sentencing that she

would not be imprisoned to more than five years.

On August 22, 1988, Guerra's counsel filed a pleading entitled "Defendant's Notice of Reliance Upon Additional Authority." Notwithstanding the numerous inquiries by Guerra's counsel to Court's staff as to the status of the Court's ruling, there failed to be a decision even as late as January of 1989. Frustrated by the Court's failure to render a decision, counsel filed a Petition for a Writ of Mandamus with the Eleventh Circuit Court of Appeals on January 31, 1989 requesting that the Court order Judge Scott to issue his ruling. While the Petition was pending, Judge Scott issued his Memorandum and Opinion dated March 3, 1989. The fact that Judge Scott considered the ex parte information for the purposes beyond the resolution of the presence issue did not become apparent until the March 3, 1989.

In denying the motion, Judge Scott relied upon the hearsay information in reaching its decision on the merits of Guerra's post-conviction motion. The factual findings were the result of the ex parte briefing rather than the evidence presented at the hearing. The Memorandum and Opinion is rife with evidence of the Court's bias against Guerra. It begins and ends with Judge Scott's personal opinion

as to Guerra's dangerousness, based on the personal threat that Judge Scott felt from Guerra.

The language of Judge Scott's Memorandum and Opinion begins with [App. "A"]:

"Even by Miami standards this case presents an alarming scenerio of international cocaine distribution, flight, hit teams and attempts to evade the criminal justice system"

The Memorandum and Opinion went on to state:

"In short, Guerra will say whatever is required to win her freedom. We choose not to base our decision upon such testimony." . . . Socorro Guerra is an admitted perjurer . . Guerra offers no reason to negate Casuso's testimony. Indeed the record demonstrates every logical reason to belive Casuso . . . . . "Wholeheartedly advocated for his client"

"We feel compelled to add that this case presents rather distasteful attempts to malign a competent and experienced lawyer. . . . . .

. . "While we do not suggest that either witness [Correctional Officer Lofton and Cavanaugh] knowingly made false statements, their own testimony conflicted in pertinent areas and was contradicted by documentary evidence, including jail records . . we decline to rely upon such evidence . . . . . .

"In summary, Socorro Guerra is a dangerous individual who has demonstrated disdain for the American criminal justice system. She will continue to operate both within the legal system and outside in order to gain her release and return to Colombia . . During the course of these proceedings, the U.S. Marshals service and the FBI received intelligence that a hit team was to be dispatched to Miami in order to gain her release from the Miami courthouse, we have no doubt as to the accuracy of this intelligence.

In addition, Judge Scott specifically directed in his Order that copies of the Opinion be sent to the Bureau of Prison and Parole Commission.

Subsequently, on March 8, 1989, Guerra moved dismiss her Petition as being moot. Guerra timely filed her Notice of Appeal on March 9, 1989.

The United States Court of Appeals for the Eleventh Circuit without oral argument affirmed the lower court's decision on November 13, 1989.

REASONS FOR GRANTING THE WRIT

There is a substantial question, under the circumstances, an inquiry whether the ex parte briefing to Judge Scott learned in his judicial capacity that threats against his life had been made by the defendant in this case violates the principles first enunicated by this Court requiring recusal of a judge where there is such a likelihood that the probability of actual prejudice creates an unconstitutional risk of bias and where the judge's findings demonstrate absence of judicial detachment in violation of due process clause of the Fifth Amendment.

In Tumey v. Ohio, 273 US 510, this Court found that in determining whether contemptuous conduct in the court of state court criminal trial, though

short of personal attack on the trial judge, was such would so provoke the trial judge and so embroil him in controversay as to require that post-trial contempt proceedings be conducted before another judge, the inquiry must be not only whether there was an actual bias on the trial judge's part, but also whether there was such a likelihood of bias that the judge was unable to hold the balance between vindicating the interests of the court and interests of the accused. Here this Court found that such a strigent rule may sometimes bar trial judges who have no actual bias and who do their best to weigh the scales of justice equally, but due process of law requires no less. In re Murchison, 349 US 133. This Court found in In re Murchison, "a fair trial in a fair tribunal is a basic requirement of due process." Finding that a biased decisionmaker constitutionally unacceptable but "our system of law has always endeavored to prevent even the probability of unfairness." Id at 136: Tumey v. Ohio, 273 US 510; Taylor v. Hayes, 418 US 57.

This Court held that an examination of the trial to ensure that the trial judge, despite good cause for adverse feelings towards a defendant, has

conducted a fair trial. United States v. Grinnell Corp., 384 US 563, where this Court applied judicial recusal statute, stated that for prejudice to be disqualifying it must "result in an opinion on the merits of some basis other than what the judge has learned from his participation in the case. United States v. Trigg, 392 F.2d 860, cert. denied, 391 US 961 (1968). An exception to the general rule that the disqualifying bias must stem from extra - judicial sources is the situation in which "such a pervasive bias and prejudice is shown by otherwise judicial conduct would constitute bias against a party. The alleged bias and prejudice must stem from an extrajudicial source and result in an opinion on the merits of some basis other than what the judge learned from his participation in the case. Berger v. United States, 255 US 22.

In Gibson v. Berryhill, 411 US at 579, n 17, the question of the constitutionality of combining one agency both investigative and adjudicative functions in the same proceeding was raised but did not require answering.

This Court in Pickering v. Board of Education, 391 US at 578-579, n 2 (1968) did not analyze the question raised by this case because the appellant [Pickering] had not raised a due process contention in the state proceedings. In that case, "the tier of fact was the same body that also both the victim of appellant's statements and the prosecutor that brought the charges aimed at securing his dismissal. The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication must overcome a presumption of honest and integrity in those serving as adjudicators, and it must convince that, under a realistic appraisal of psychological tendencies and human weaknesses, conferring investigative and adjudicative power on the same individuals posses a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

The Supreme Court has never taken this reasoning further than the presumption of honesty and integrity there appears to be no further factor to be weighed on the side of nonrecusal based on the status of judge.

The Supreme Court has repeatedly stated that due process requires an "unbiased decision-maker" who is not tempted to tilt the balance from the "nice, clear and true" point between the defendant and the prosecution. In Tumey, this Court's inquiry was the assessment of the "possible temptation to the average man as a judge." 273 US at 532 (1927)

In Withrow v. Larkin, 421 US 35, (1975), this Court went further and identified certain situations in which "experience teaches that the probability of actual prejudice on the part of the judge or decision maker is too high to be constitutionally tolerable." One of the situations so identified is where the adjudicator has been the target of personal abuse. Although the Court was referring to verbal abuse, this Court made no attempt to reconcile this constitutionally-based requirement with the statutory provisions nor did it mention recusal statutes. The Supreme Court did not take this reasoning further.

Although this Court was referring to verbal abuse, the unreconciled question when the abuse is an alleged threat to a judge's life or safety is a constitutional question requiring the wisdom of this

Court for clarification of the likelihoods applicable to the recusal statute that due process requires more protection than is offered in the "pervasive evidence" standard, as well as other approaches by the Circuits with inconsistent results of the interpretations of the Supreme Court's previous decisions.

Some Circuit Courts have drawn a distinction as to the effect of judicial bias depending upon whether the judge or the jury is the finder of fact.

The Fifth Circuit in Menzies v. Procunier, 743 F.2d 281, held that testimony concerning alleged threats against complainant, as well as testimony concerning alleged subornation of witness scheme, when combined with prosecutor's closing argument in which he, without evidentiary basis, implied that prisoner was somehow directly involved in both matters denied prisoner a fundamentally fair trial entitled by due process clause of the Fourteenth Amendment, See also Houston v. Estelle, 569 F.2d 372.

The Seventh Circuit held in Wilks v. Israel, 627 F.2d 32, in which the defendant twice physically attacked the judge that since the attacks both took place outside the presence of the jury and the jury was responsible for the verdict, the error harmless.

The Eighth Circuit has interpreted this decision to create a presumption of bias where, presuming the honesty and integrity of the judge, and "realistically considering psychological tendencies and human weaknesses, the judge would be unable to hold the proper balance between the state and accused." Dyas v. Lockhart, 705 F.2d 993, 996-997, cert. denied, 464 US 982. Having found in Dyas that the potential for bias was present, the Court remanded the case for the District Court's consideration of the trial judge's "overall conduct during the course of the trial and whether the judge exhibited any specific bias or prejudice against [the defendant]." Id at 997. Where the facts reveal the potential for judicial bias, any evidence that the trial judge did not remain "neutral and detached" will be sufficient to require the finding of a due process. In Dyas, the potential bias resulted from an extrajudicial source - the judge was the prosecutor's uncle. The Eleventh Circuit applies the "pervasive bias" test. However, there is certainly nothing in the Dyas or Supreme Court opinions that would indicate that the due process protections would be any less depending upon the

source of the bias. In Dyas v. Lockhart, in accordance with the purpose behind 28 U.S.C. 445(a) of assuring the "appearance of impartiality" applied.

The Ninth Circuit in Battaglia v. United States, 390 F.2d 256, concluded where impartiality "might reasonably have been questioned" the "preservation of the proper image of justice" requires a judge to do one or two two things - either rescue himself or fully disclose the information and grant the defendant opportunity to rebut or counter the allegations.

The Second Circuit in United States v. Gallego, (1989) recently reversed a conviction and remanded before another judge based on the judge's remarks. The decision in that case although not directly applicable, dealt with a type of prejudice with statements ascribing guilt or responsibility merely by virtue of nationality of the individual were considered to be reversible error.

It has been held by other circuits an accused can be denied due process of law because extraneous considerations render improbable or impossible an impartial judgment. Others have held an accused is denied due process precisely because extraneous considerations effectively crippled the defense.

This Court's familiar examples of instances requiring its wisdom where actual or potential prejudice to the accused had been unacceptably affected the deliberative process of the jury involving mass media publicity. Estes v. Texas, 381 US 532; Sheppard v. Maxwell, 384 US 333; cases that involved mob-dominated proceedings as in Moore v. Dempsey, 261 US 86; and, the trial of an accused in a prison uniform or shackles, Boswell v. Alabama, 537 F.2d 100 where the jury was the tier of fact.

In pursuit of this end the wide divergence among the federal circuits in their determinations the question as to whether there was an actual bias, whether there was such a likelihood of bias, or the pervasive evidence standard applies to situations where the adjudicator has been the target of personal abuse suggests that further refinement of the constitutionally-based requirement is necessary.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

SOCORRO GUERRA, pro se

PROOF OF SERVICE

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SOCORRO GUERRA AFFIANT

AUTHORIZED BY THE ACT OF JULY 27,
1955, TO ADMINISTER OATHS (18 U.S.C. 4004)

CASE MANAGER
FCI- MIAMI, FL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-0635-CIV-SCOTT

SCORRO GUERRA

Plaintiff

vs. FINAL JUDGMENT

UNITED STATES OF AMERICA,

Defendant.

_____/

Pursuant to the Memorandum Opinion, judgment is in favor of the United States of America and against the Petitioner, Socorro Guerra. The Court retains jurisdiction to tax costs upon appropriate motion.

DONE and ORDERED in Chambers, at Miami, Florida, this 3rd day of March, 1989.

_____
THOMAS E. SCOTT
UNITED STATES DISTRICT JUDGE

Copies mailed to:

Marc S. Nurik, Esquire
Eileen O'Connor, AUSA-Ft. Launderdale

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 85-6103-CR-SCOTT
85-0681-CR-SCOTT
88-0635-CIV-SCOTT

UNITED STATES OF AMERICA,

Plaintiff,

vs. MEMORANDUM OPINION

SOCORRO GUERRA,

Defendant.

_____/

Even by Miami standards, this case presents an alarming scenario of international cocaine distribution, flight, hit teams and attempts to evade the criminal justice system. The Petitioner, Socorro Guerra, is a major narcotics trafficker with close ties to the Medellin Cartel. She was indicted and pled guilty in two cases (Case No. 8506103-CR-SCOTT and 85-0681-CR-SCOTT) for her involvement in the importation of two loads of cocaine which were seized in Florida and Colorado, totaling approximately 1,200 pounds in weight. The major issue in these proceedings is whether

Guerra's former counsel made misrepresentations to her concerning the plea. Following a non-jury trial, we reject Guerra's contentions finding that her claims are merely another attempt to evade justice. Federal Rule of Civil Procedure 52(a). See Anderson v. City of Bessemer City, No. Carolina, 470 U.S. 564 (1985).

Initially, Guerra filed a Motion to Vacate or Correct Illegal Sentence, invoking Federal Rule of Criminal Procedure 35 and 28 U.S.C.A. §2255. The thrust of the motion was to obtain a new sentence. Guerra alleged ineffective counsel assistance based upon: 1) misrepresentations conerning the plea; 2) conflict of interests; 3) failure to read the Presentence Investigation Report; and 4) factual inaccuracies in the Presentence Investigation Report. Importantly, Guerra did not profess innocence or seek a new trial. Seven months later, she filed a new motion seeking to withdraw her guilty plea. For the first time, Guerra sought to withdraw the plea and obtain a trial on the merits.

MISREPRESENTATIONS

While Guerra's contentions concerning ineffective assistance of counsel have varied, depending upon the state of the record, the major claim remains that her former counsel, Luis Casuso, made misrepresentations and false promises concerning the effect of her plea and the sentence which she would receive, thereby rendering her plea involuntary. In resolving this issue, the Court has carefully reviewed the voluminous depositions, documentary evidence, affidavits and videotapes, as well as the excellent memorandum of law submitted by counsel.

Socorro Guerra is an admitted perjurer. She has lied on various critical issues. To point out just a few, Guerra lied about her knowledge of the English language. She lied conerning whether she read the Presentence Investigation Report. Indeed, a review of her deposition reveals contradiction after contradiction. In short, Guerra will say whatever is required to win her freedom.

We chose not to base our decision upon such testimony.

At trial, Guerra offered the testimony of two corrections officers, Thelma Loftin and Elsie Cavanagh, in an effort to corroborate her claim that her lawyer promised her a lower sentence than was given. While we do not suggest that either witness knowingly made false statements, their own testimony conflicted in pertinent areas and was contradicted by documentary evidence, including jail records. At best, their recollection of the events was faulty, including the dates of meetings, presence of individual's and details of conversations. Similarly, we decline to rely upon such evidence.

Several voluminous depositions were taken and submitted for review by Guerra's former counsel, Luis Casuso. His testimony reveals a close working relationship with his client. Casuso visited her constantly at the jail. Guerra was kept completely abreast of all

events in the case. Parenthetically, we should observe that Socorro Guerra is a highly intelligent individual. More specifically, Casuso testified that:

1. He read the Presentence Investigation Report to Guerra prior to sentencing.

2. He denied that he made any promises to Guerra.

3. He completely informed Guerra as to the legal consequences of the plea, including the possible sentencing range of up to thirty-five years.

4. He denied any conflict of interest between Guerra and Bernardo Martinez-Diaz.

5. He fulfilled all his obligations to his client, Socorro Guerra.

The Court finds that Casuso is credible. Guerra offers no reason to negate Casuso's testimony. Indeed, the record demonstrates very logical reason to believe Casuso.

Guerra had a good reason to accept the plea. The evidence against her was overwhelming.

Guerra is on tapes (telephone and meetings) discussing both cocaine loads. She met on numerous occasions with undercover agents to plan the importation. She was photographed by surveillance agents at one planning session.

Faced with the prospect of a guilty verdict, Casuso negotiated a plea. The plea reduced Guerra's exposure from one hundred nineteen years to thirty-five years. It also contemplated the prospect of a 18 U.S.C. §4205(b)(2) sentence. The plea was a commendable accomplishment, in light of the overwhelming evidence and amount of cocaine.

The plea colloquy also supports Casuso's testimony. During the course of the plea colloquy, while under oath, Guerra stated that there were no promises outside the plea agreement. When the Court asked her if there were any "secret deals," she replied "No." Guerra was twice informed that the maximum penalty of thirty-five years could be imposed. She acknowledged that she understood. The

Court also explained to the Defendant that it could impose a "(b)(2)" sentence. Guerra replied that a "(b)(2)" sentence had been explained to her. This was confirmed by her attorney. On three separate occasions, the Petitioner stated that all of her answers were truthful.

Attorney Casuso acknowledged at the sentencing proceeding that he had read the Presentence Investigation Report. Although Guerra did not directly acknowledge the opportunity to read and discuss the report, she acknowledged this in her affidavit dated August 4, 1986. Mr. Casuso testified unequivocally that the Presentence Investigation Report was read to Guerra. Subsequent probation documents confirmed his testimony.

At the sentencing, Mr. Casuso blamed his client's involvement on her co-defendant cousin, Bernardo Diaz. Mr. Casuso characterized his client as a "conduit" between Mr. Bernardo Diaz in Colombia and Gilberto and Maria Diaz in the United States. He wholeheartedly advocated for his client and against the

interests of Diaz. After Mr. Casuso and his client addressed the Court, Guerra was informed a "(b)(2)" sentence would not be imposed due to the amount of cocaine involved. Guerra was given the opportunity to withdraw her plea of guilty. The Court took a recess so she could discuss the matter with counsel. After a discussion with counsel, she declined the offer and chose to proceed to sentencing. She was sentenced to the maximum term of imprisonment on each count for a total of thirty-five years. A mandatory special term was inadvertently omitted by the Court. In short, the transcript and other documentary evidence fully buttresses Casuso's testimony and refutes the Petitioner's case.

The Court rejects the Petitioner's claim that Luis Casuso made misrepresentations to his client. Strickland v. Washington, 466 US 668 (1984); Smith v. Dugger, 840 F.2d 787, 794 (11th Cir. 1988); TaFero v. Wainwright, 796 F.2d 1314, 1319 (11th Cir. 1986). The Court finds that Guerra made a knowing, voluntary and

informed decision to enter her plea. She understood the consequences. She was assisted by competent counsel. Ruiz v. United States, 494 F.2d 1 (5th Cir. 1974) cert. denied, 419 U.S. 899 (1974); see also Johnson v. Massey, 516 F.2d 1001, 1002 (5th Cir. 1975); United States v. Maggio, 514 F.2d 80, 88 (5th Cir. 1975).

In rejecting this claim, we feel compelled to add that this case presents a rather distasteful attempt to malign a competent and experienced lawyer. We hope this order completely vindicates Luis Casuso and lays to rest these allegations. This case also presents a classic illustration of the unfortunate and oft-repeated scenario that no matter what judges or defense attorneys to do protect a record, explain rights and consequences and offer every protection to a defendant, their efforts can always be collaterally attacked by innuendo and second-guessing. finding that and nothing more, we reject this claim and turn to the next issue.

CONFLICT OF INTEREST

Socorro Guerra argues that Luis Casuso had a conflict of interest by virtue of his representation of a co-defendant in a prior, unrelated criminal matter. We also reject this claim. There was no conflict of interest.

Casuso represented Guerra's fugitive co-defendant, Bernardo Diaz. Casuso represented Diaz on a prior unrelated case, in which he ultimately fled justice back to Colombia. Guerra acknowledges in her affidavit of July 3 at paragraph 6, that she knew Mr. Casuso represented Diaz.

In order for a defendant to demonstrate a violation of her Sixth Amendment rights, she must establish that an actual conflict of interest adversely affected her counsel's performance. Cuyler v. Sullivan, 446 U.S. 335, 350 (1980). Mere allegations that a conflict of interest existed are insufficient. A defendant must make a factual showing of both (a) inconsistent interests in the record and (b) that the attorney made a choice between

possible alternative courses of action, which were helpful to one client while harmful to the other. There is no violation where the conflict is irrelevant or hypothetical. United States v. Mers, 701 F.2d 1321, 1328 (11th Cir. 1983). See also United States v. Olivares, 786 F.2d 659, 633-644 (5th Cir. 1986); United States v. Romero, 780 F.2d 981, 986 (11th Cir. 1986); Oliver v. Wainwright, 782 F.2d 1521, 1524-1525 (11th Cir. 1986).

While Casuso did represent Bernardo Diaz in another case a number of years earlier, he was not retained to represent Diaz in this case. In fact, Diaz had been a fugitive since the indictment was filed in this case. And, while counsel did meet with Diaz in Colombia during this case, it was not for purposes of representation of this case.

Moreover, Mr. Casuso's comments at sentencing do not demonstrate the existence of conflicting interests or any hesitancy on his part to implicate Diaz -- rather, his comments show

that he places the blame for Guerra's situation squarely in Diaz' lap:

> [T]he reason she got involved in this case is because of Bernardo Diaz, who is a relative of hers in Colombia. I represented Mr. Diaz when he was involved in the Banco Shares case here. Also in that case he got his family involved.
>
> In that case he had a cousin of his involved and his mother-in-law in Los Angeles involved.
>
> I don't feel she is the organizer in this case. I feel she was a conduit between Mr. Diaz in Colombia and Mr. Diaz, a co-defendant here and his wife.

In sum, the record reveals no actual conflict of interest and, in fact, demonstrates his efforts to mitigate his client's involvement at Bernardo Diaz' expense.

Moreover, Guerra's general statement that a conflict of interest caused Mr. Casuso to omit the introduction of evidence which would have criminally implicated Bernardo Diaz in much greater detail lacks substantiation in the record. There was no dispute at sentencing that Bernardo Diaz was the major player in the conspiracy. This was made clear in the Presentence INvestigation Report. On the

organization chart Diaz is the top person. He is listed as the source of the cocaine, at page 2. The introduction of further evidence of Bernardo Diaz' involvement would not have affected the substantial evidence detailing Guerra's role.

Casuso blamed Bernardo Diaz for Guerra's involvement in the case, both orally at sentencing and in the detailed defense Presentence Investigation Report. He concentrated on minimizing Guerra's own role in the conspiracy. This was not a choice of competing interests and did not prejudice Guerra in the least. See United States v. Olivares, supra at 663-664. (Even if conflict existed, Defendant must prove prejudice in accordance with standards set out in Strickland v. Washington, supra). In summary, Guerra has not demonstrated sufficient facts to show either that Casuso was representing her under an actual conflict of interest, or, that she was prejudiced by the representation even if there was a conflict.

OTHER CLAIMS

The Petitioner also argues Rules 32(C)(3)(A) and (C)(3)(D) were violated. However, the record reveals that the Petitioner and her counsel were afforded an opportunity to comment on the Presentence Investigation Report. In fact, the Petitioner presented her own detailed Presentence Investigation Report. Rule 32 requires only that the defendant have an opportunity to read the Presentence Investigation Report. It is not necessary for the District Court to personally question the defendant as to whether she read the Presentence Investigation Report. United States v. Aleman, 832 F.2d 142, 144 (11th Cir. 1987), United States v. Sambino, 799 F.2d 16, 17 (2nd Cir. 1985), United States v. Mays, 798 F.2d 78, 80 (3d Cir. 1986). Casuso testified that the Pre-Sentence Investigation Report was read to Guerra and her initial affidavit dated August 4, 1986 so acknowledged. Guerra's claim during her deposition that she never saw the Presentence

Investigation Report is without basis. Indeed, as previously found, it refuted by probation documents.

Finally, failure to raise objections as to a Presentence Investigation Report's inaccuracy at sentencing bars raising such objection in a later motion under Rule 35. Parks v. United States, 832 F.2d 1244, 1246 (11th Cir. 1987), United States v. Edmondson, 818 F.2d 768, 769 (11th Cir. 1987) or, under a 28 U.S.C. 2255 petition, Parks v. United States, supra, Simmons v. United States, 777 F.2d 660 (11th Cir. 1985). If defense counsel does not contest the Presentence Investigation Report, the procedural mechanisms set out in Rule 32 (C)(3)(D) never come into play. United States v. Aleman, supra at 144.

The Rule speaks only of challenges to "factual inaccuracies." Defense protest as to recommendations, opinions or conclusions are not fundamentally factual in nature. United States v. Aleman, supra at 145. Additionally, the Government's opinion as to culpability does not constitute a factual

proposition that would trigger that applicability of Rule 32(C)(3)(D). United States v. Caraza, Slip Op. 86-5548, (11th Cir. decided April 25, 1988 at 2528).

At sentencing, Casuso asserted that Guerra was merely a "conduit" between Diaz in Colombia and a co-defendant in the United States. He argued that she was not an organizer. The Presentence Investigation Report addresses Guerra's role. Under the heading "Probation Officer's Assessment" at page 8, it states, "She is classified as having a managerial position and being a direct connection to the source in Colombia." This is also reflected on page 1 of the Presentence Investigation Report under the heading, "Co-defendant Information." Calling Guerra a "conduit" is consistent with the facts set forth in the Presentence Investigation Report. While counsel did not make a specific objection, assuming arguendo that counsel's statements are an objection, it would have been overruled. After a review of the record, including DEA-6's and tape

transcripts, the Court finds that the Presentence Investigation Report accurately reflects Guerra's role. She held a managerial position and had a direction connection to the source in Colombia. She was the head of the United States operation.

CONCLUSION

In summary, Socorro Guerra is a dangerous individual who has demonstrated disdain for the American Criminal Justice System. She will continue to operate both within the legal system and outside in order to gain her release to Colombia. Her daughters and cousin have already fled justice in this case. During the course of these proceedings, the U.S. Marshals Service and the F.B.I. received intelligence that a hit team was to be dispatched to Miami in order to gain her release from the Miami Courthouse. We have no doubt as to the accuracy of this intelligence. In this case, Mrs. Guerra's testimony was perjurious. In the process, she maligned a competent attorney. In short, her efforts

to gain release know no bounds. We do not intend to further her efforts by granting the relief sought. Accordingly, it is ordered as follows:

1. Motion to Vacate or Correct Illegal Sentence is denied.

2. The Petition, pursuant to Title 28 U.S.C. §2255, is denied.

3. Motion pursuant to rule 35 is denied.

4. Copies of this Order will be provided to all counsel, Bureau of Prisons and Parole Commission.

DONE and ORDERED in Chambers, at Miami, Florida, this 3rd day of March, 1989.

THOMAS E. SCOTT
UNITED STATES DISTRICT JUDGE

Copies mailed to:

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-5246
Non-Argument Calendar

D. C. Docket No. 85-6103-CR-TES

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SOCORRO GUERRA,

Defendant-Appellant.

No. 89-5313
Non-Argument Calendar

D. C. Docket Nos. 85-681-CR-TES, 88-635-CIV-TES

SOCORRO GUERRA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeals from the United States District Court
for the Southern District of Florida
(November 13, 1989)

Before TJOFLAT, Chief Judge, HILL* and
HENDERSON, Senior Circuit Judges.

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*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

Socorro Guerra, a native of Colombia with ties to the Medellin cocaine cartel, pleaded guilty in the United States District Court for the Southern District of Florida to violations of 21 U.S.C. §§841(a)(1) and 846.[1] The district court sentenced Guerra to 35 years imprisonment. She did not appeal. On October 27, 1987, some 22 months after pleading guilty, Guerra filed this habeas corpus petition and moved to withdraw her plea of guilty.[2] The district court denied relief. We affirm.

In her petition, Guerra sought to withdraw her guilty plea as involuntary. She premised her contention of involuntariness upon the alleged ineffectiveness of her counsel, Luis Casuso. Though she included other allegations, Guerra primarily focused upon Casuso's alleged misrepresentation of her potential prison term[3] and upon Casuso's alleged conflict of interest.[4]

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[1] Guerra was involved in the importation of approximately 1200 pounds of cocaine into Florida and Colorado. The negotiated plea reduced her prison exposure from 119 years to 35 years.

[2] Guerra based her habeas petition upon grounds first asserted in a Fed.R.Crim.P. 35 motion to reduce or correct her sentence. Upon receiving the defendant's Rule 35 motion, the district court scheduled an evidentiary hearing. The court cancelled that hearing upon learning from Judge Spellman as coordinator of court security, the Marshal's Service and the Federal Bureau of Investigation ("FBI") that a Colombian "hit team" was prepared to effect a violent rescue of Guerra. The court ordered that Guerra be deposed while incarcerated and permitted additional depositions of other material witnesses, including Luis Casuso, the attorney who represented Guerra through the change of plea proceedings.

[3] According to Guerra, Casuso promised her a prison term of five years.

[4] This claim is based upon Casuso's relationship with Bernardo Diaz. Previously, Casuso represented Diaz in an unrelated criminal action. Following sentencing in that case, Diaz fled the country. Diaz allegedly was involved in the criminal activity constituting the charges to which Guerra pled guilty, and eventually, he was named in a superseding indictment. Prior to the return of that indictment, and with the approval of his client, Guerra, Casuso visited Diaz in Medillin, Colombia. The purpose of the visit was to satisfy unnamed individuals that the 1200 pounds of cocaine in fact had been seized by law enforcement officers rather than stolen by Guerra and to request funds for Guerra's bond. Casuso did not represent Diaz at the time of the trip to Colombia.

In denying relief, the district court made several credibility choices and effectively found that Guerra and the witnesses called on her bahalf were not credible; the court accepted Casuso's testimony as credible. The court expressly rejected Guerra's contentions of misrepresentations and found that her decision to plead guilty was a "knowing, voluntary and informed decision. ." ROA Vol.2 of 2-383-6. The court noted that, during the plea colloquy, Guerra responded negatively to the court's inquiry into the existence of any "secret deals" and that she twice was informed that the maximum penalty for the two counts was 35 years. Id. at 4. The court also noted that, during the sentencing proceeding, Guerra was afforded the opportunity to withdraw her guilty plea. After a recess and consultation with Casuso, she opted to continue with the sentencing.[5] Id. The Court found that Guerra understood the

consequences of her plea and that she had benefitted from the assistance of competent counsel. Id. at 6.

The district court also found that "[t]here was no conflict of interest." Id. It found that Diaz had not yet been indicted in this case, that Casuso had not been retained to represent Diaz and that the meeting in Colombia was not for purposes of representation in this case. Id. at 7. The court determined that Casuso's comments during the sentencing of Guerra demonstrated the absence of a conflict of interest and exhibited an effort to mitigate his client's involvement at Diaz' expense.[6] Id. at 8.

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[5] In the plea agreement, the government agreed not to object to the imposition of a sentence pursuant to 18 U.S.C. §4205(b)(2). At sentencing, the court informed Guerra that a "(b)(2)" sentence would not be considered. That decision prompted the district court to offer Guerra the opportunity to withdraw her plea, an opportunity which she rejected.

[6] Casuso implicated Diaz as the organizer of the importation scheme and noted his propensity for involving family members, of whom Guerra was one, in criminal enterprises.

Federal Rule of Criminal Procedure 32(d) "provides that a plea which is 'valid when made may nevertheless be withdrawn if the interest[s] of justice so require.'" United States v. Campbell, 778 F.2d 764, 767 (11th Cir 1985), quoting United States v. Russell, 686 F.2d 35, 39 (D.C. Cir. 1982) (footnote omitted); see United States v. Lake, 709 F.2d 43, 45 (11th Cir. 1983) (court may permit the withdrawal of a guilty plea to correct manifest injustice). Three considerations guide an appraisal of whether the withdrawal of a guilty plea after sentence will serve the interests of justice: (1) the strength of the defendant's reason for withdrawing the plea,[7] including whether the defendant asserts her innocence; (2) the possible prejudice which might result to the government's case if the defendant is permitted to withdraw her guilty plea and proceed to trial; and (3) the existence of and the defendant's reliance upon any affirmative misrepresentations made by the government.

Campbell, 778 F.2d at 767-68 (citations omitted). On appeal, we look to "whether the district court exceeded the bounds of its discretion in concluding that there was no 'manifest injustice.'" Lake, 709 F.2d at 45.

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[7] As discussed herein, Guerra identifies the ineffective assistance of her counsel as the primary reason for withdrawing her guilty plea. As such, she implicates Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). In Hill, the Supreme Court concluded that "the two-part Strickland v. Washington, test applies to the challenges to guilty pleas based on ineffective assistance of counsel." Hill, 474 U.S. at 58, 106 S.Ct. at _____, 88 L.Ed.2d at 210. To satisfy this test, a petitioner must establish first that "counsel's representation fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, ____, 80 L.Ed.2d 674, 696 (1984). Second, the petitioner msut show that "there is a reasonable probability that, but for counsel's errors, [she] would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at at 59, 106 S.Ct. at ____, 88 L.Ed.2d at 210. (footnotes omitted). In determining on appeal whether Guerra was victimized by ineffective assistance of counsel, we must independently apply the applicable legal principles to the district court's findings of historical fact. Adams v. Balkcom, 688 F.2d 734, 739 (11th Cir. 1982).

Before us, Guerra urges that the court's denial of her motion was an abuse of discretion and resulted in manifest injustice. She contends that this abuse of discretion occurred because the district court made erroneous findings of fact, and she further maintains that such error resulted from judicial bias. We first address Guerra's allegation of judicial bias.

Guerra claims that this alleged judicial bias grew out of the court's knowledge of the violent escape plan. See n.2 supra. Though she made no motion for recusal in the district court, Guerra argues that the district court judge was obligated to recuse himself sua sponte pursuant to 28 U.S.C. §455.[8] Factually, Guerra points to certain language in the district court's order as exhibiting pervasive bias and prejudice.

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[8] Section 455(a) provides that "[a]ny justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which is impartiality might reasonably be questioned." Section 455(b)(1) provides that a judge shall also disqualify himself "[w]here he has personal bias or prejudice concerning a party . . ."

Prejudice sufficient to require recusal must stem from extrajudicial sources and must be directed against a party to the proceedings. Hamm v. Members of Bd. of Regents of State of Florida, 708 F.2d 642, 651 (11th Cir. 1983). "An exception to that rule is made when a judge's remarks in a judicial context demonstrate such pervasive bias the prejudice that it constitutes bias against a party." Id. at 651. Since the appellant failed to invoke section 455 in the district court, we review this issue under the plain error standard. Id.

The Marshal's Service in coordination with with the FBI obtained information concerning the possible rescue/escape of Guerra and informed the district court ex parte[9] through appropriate channels. It seems clear to us that the district court judge learned of the escape plan in his capacity as the presiding judge. See United States v. Meester, 762 F.2d 867, 885 (11th Cir. 1985). Thus, the appellant must establish pervasive bias and prejudice.[10] In doing so, she relies upon isolated statements

and references in the district court's order to "hit teams," "attempts to evade the criminal justice system," Guerra's dangerousness and her "disdain for the American criminal justice system." While these statements take out of context arguably demonstrate the absence of a certain "judicial detachment," they fall far short of indicating pervasive bias and prejudice. The statements relied upon recount the historical facts of this case and reflect the reality of the Medellin cartel's operation. The bulk of the court's order focuses upon the testimony and the documentary evidence. The district court judge did not err by failing to recuse himself.

Having determined that the factual findings made by the district court were not the product of judicial bias, we consider whether those findings, and the credibility choices upon which they were based, are clearly erroneous. United States v. Arends, 776 F.2d 262, 264 (11th Cir. 1985) (credibility choices and factual determinations made by the district court must be upheld unless plainly erroneous). The district court examined and carefully considered the

voluminous evidence. It recited the discussions undertaken and the statements made during both the plea change[11] and sentencing proceedings.

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[9] In a subsidiary attack, Guerra contends that this ex parte communication and the district court's refusal to permit her to question some unnamed officer or informant violated her sixth amendment right to confront her accusers. The district court briefed both parties on the escape situation shortly after learning of it, and the court permitted the appellant to examine a Deputy United States Marshal. Without deciding whether a petitioner is in all similar situations entitled to investigate on the record the basis and extent of such reports, we do not think Guerra's constitutional rights in this situation were abridged.

[10] As we stated previously, Guerra did not raise the issue of bias in the district court. In fact, the appellant admits that, following disclosure of the escape plane, "Guerra's rights to consult with counsel and to conduct cross-examination were preserved" by the court. Brief of Appellant at 4. The district court's action was reasonable in light of the circumstances and weighs against the appellant's allegation of bias.

[11] "While Rule 11 is not insurmountable, there is a strong presumption that the statements made during the colloquy were true." United States v. Gonzales-Mercado, 808 F.2d 796, 800, n.8 (11th Cir. 1987).

The court emphasized numerous contradictions and discrepancies in the evidence, testimonial and otherwise, presented by Guerra. Conversely, the court found that the available evidence supported Casuso's portrayal of the events. It concluded that Guerra's allegations of ineffective assistance of counsel,[12] including the claims that he misrepresented Guerra's prison exposure and that he labored under a conflict of interest, were not supported by the credible evidence. We conclude that these findings are not clearly erroneous, and based thereon, we hold that Casuso's representation did not fall below an objective standard of reasonableness.

Returning to the considerations which govern a defendant's motion to withdraw a guilty plea, it not becomes clear that Guerra's reason for withdrawing her plea -- the ineffective assistance of her counsel -- is not a strong one. We also

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[12] The court also addressed and disposed of Guerra's other claims of ineffective assistance of counsel. We agree with the disposition of these issues.

note that she has yet to profess her innocence. Therefore, the first consideration weighs heavily against her. As for the second consideration, the government produced evidence of the potential prejudice which might result to the government's case if Guerra is allowed to withdraw her guilty plea. Witnesses have been relocated or are unavailable. Guerra disputes but presents no evidence to contradict the government's position. Based upon the record, we think this "prejudice" consideration weighs in favor or the government. Finally, Guerra has made no allegation that the government made any affirmative misrepresentations.

Examined in their entirety, then, these considerations clearly do not support Guerra's argument that the district court abused its discretion in denying her petition to withdraw her plea of guilty.

Accordingly, the judgment of the district court is

A F F I R M E D.

Supreme Court, U.S.
FILED
APR 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1288 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1989

SOCORRO GUERRA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district judge committed plain error in failing *sua sponte* to recuse himself from ruling on petitioner's motion to vacate her guilty pleas.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1280

SOCORRO GUERRA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20-32) is unpublished, but the decision is noted at 891 F.2d 906 (table). The opinion of the district court (Pet. App. 2-19) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1989. The petition for a writ of certiorari was filed on January 11, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On January 7, 1986, petitioner pleaded guilty to one count in each of two separate indictments returned in the United States District Court for the Southern District of Florida.

In the first case, she pleaded guilty to possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); in the second case, she pleaded guilty to conspiring to distribute cocaine, in violation of 21 U.S.C. 846.[1] Petitioner was sentenced to consecutive terms of 20 years' and 15 years' imprisonment. She did not appeal.

Some 22 months later, petitioner filed a motion to obtain a new sentence. She claimed that her lawyer: (1) had made misrepresentations concerning the sentence she would receive, (2) had labored under a conflict of interest, and (3) had failed to read the presentence report. Pet. App. 3. Seven months later, petitioner filed a motion to withdraw her guilty pleas and to go to trial. *Id.* at 3, 21-22. The district court denied that motion (*id.* at 1-19), and the court of appeals affirmed. *Id.* at 20-32.

1. In her motion, petitioner claimed that Luis Casuso, the lawyer who represented her at the time of her guilty pleas, promised that she would not be sentenced to more than 10 to 15 years' imprisonment. Petitioner also alleged that Casuso had a conflict of interest because he had previously represented Bernardo Diaz, who was named a co-conspirator of petitioner's in a superseding indictment. Pet. App. 21-22 & nn.3, 4.

The district court ordered an evidentiary hearing on petitioner's claims. The trial judge, however, canceled that hearing when another judge of the court told him that the FBI and the Marshals Service had learned of a plot to free petitioner from jail. Pet. App. 22 n.2. According to that information, a "hit team" of Colombians was going to enter this country to free petitioner. The district court therefore had petitioner and other witnesses deposed. She did not appear

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[1] The charges against petitioner, a Colombian native, arose from her involvement in the importation of 1,200 pounds of cocaine into Florida and Colorado. Pet. App. 2, 21 n.1.

in court in any later hearings, although her lawyers appeared on her behalf. *Ibid.*

After considering the deposition testimony, affidavits, and other information, the district court denied petitioner's motion to withdraw her guilty pleas. Pet. App. 1-19. The court found that petitioner was an admitted perjurer who would "say whatever is required to win her freedom." *Id.* at 4-5. The court credited the testimony of petitioner's prior attorney, Casuso. The court found that Casuso had enjoyed a "close working relationship" with petitioner, had informed her that she faced a potential sentence of up to 35 years' imprisonment, had not made any promises to petitioner, and had fulfilled all his obligations to his client. *Id.* at 5-6.

The district court also found that petitioner's statements at the time she pleaded guilty supported Casuso's testimony. At that time, petitioner denied that there were any promises beyond the plea agreement, and she denied that there were any "secret deals." Pet. App. 7. She also acknowledged that she understood that the maximum sentence could be 35 years' imprisonment. *Ibid.* Lastly, the court found that Casuso "wholeheartedly advocated for his client and against the interests of Diaz." *Id.* at 8-9. Accordingly, the district court concluded that petitioner's plea was knowing, voluntary, and intentional, and that Casuso did not have a conflict of interest. *Id.* at 9-10.

2. The court of appeals affirmed. Pet. App. 20-32. The court rejected petitioner's argument that the district court was biased against her.[2] The court noted that petitioner had failed to move the district judge to recuse himself under 28

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[2] The court of appeals also rejected petitioner's contention that the trial court abused its discretion in not vacating petitioner's convictions. Petitioner does not renew that claim in this Court.

U.S.C. 455.[3] Pet. App. 27, 28. Thus, the court reviewed petitioner's claim of undue bias under the plain-error standard of Rule 52(b), Fed. R. Crim. P.

The court of appeals held that the district judge did not commit plain error in failing to recuse himself. The court noted that the district judge learned of the escape plan "in his capacity as the presiding judge." Pet. App. 28. As a result, the court said, petitioner had to prove "pervasive bias and prejudice." *Ibid.* According to the court of appeals, petitioner's showing fell far short of that requirement, because the statements in the district court's opinion on which petitioner relied simply "recount[ed] the historical facts of this case and reflect[ed] the reality of the Medellin cartel's operation." *Id.* at 29. Because most of the district court's opinion focused on the testimony and documentary evidence – not on the threat to free petitioner through force – the court of appeals concluded that the district judge did not commit plain error in failing to recuse himself. *Ibid.*

ARGUMENT

Petitioner renews her contention (Pet. 21-29) that the district judge should have disqualified himself under 28 U.S.C. 455 when he learned of the plan to free petitioner from confinement. That fact-specific claim does not warrant further review by this Court.

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[3] Section 455 provides:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> * * * * *

1. The district court advised petitioner's lawyers of the government's awareness of the escape plan and allowed defense counsel to examine a Deputy Marshal about it. Pet. App. 22 n.2, 28, 30 n.9. At the time, however, neither petitioner nor her attorneys hinted that the district judge should have recused himself. Thus, petitioner waived her claim, first raised on appeal, that the district judge should have recused himself when he learned of the possible escape plan. See *Phillips* v. *Amoco Oil Co.*, 799 F.2d 1464, 1472 (11th Cir. 1986) ("Counsel, knowing the facts claimed to support a § 455(a) recusal for appearance of partiality may not lie in wait, raising the recusal issue only after learning the court's ruling on the merits."), cert. denied, 481 U.S. 1016 (1987); see also *Stephenson* v. *Paine Webber Jackson & Curtis, Inc.*, 839 F.2d 1095, 1096 n.3 (5th Cir.), cert. denied, 109 S. Ct. 310 (1988); *Oglala Sioux Tribe* v. *Homestake Mining Co.*, 722 F.2d 1407, 1414 (8th Cir. 1983); *United States* v. *Nobel*, 696 F.2d 231, 236-237 (3d Cir. 1982), cert. denied, 462 U.S. 1118 (1983); *Delesdernier* v. *Porterie*, 666 F.2d 116, 121-123 & n.3 (5th Cir.), cert. denied, 459 U.S. 839 (1982).

Rule 52(b) allowed the court of appeals to decide whether, in the absence of an objection, the district judge committed plain error in not recusing himself. A plain error is one that results in "a miscarriage of justice." *United States* v. *Frady*, 456 U.S. 152, 163 n.14 (1982). In light of that high standard, it is clear that the district judge did not commit a plain error in failing to recuse himself. When informed of the possible escape attempt, the district judge prudently gathered evidence through depositions, and he based his decision on the evidence, not the outside threat.

2. Even if petitioner had made a recusal motion, the district judge would not have been required to recuse him-

self.[4] A judge need not recuse himself under Section 455 if his knowledge of the case stems from his official participation in the case. See *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966). Here, the district judge's knowledge of the escape plot was gained in his capacity as the presiding judge in the case. Pet. App. 28. And petitioner does not take issue with the court of appeals' observation that the district court's opinion merely "recount[s] the historical facts of this case and reflect[s] the reality of the Medellin cartel's operation." *Id.* at 29. Under those circumstances, therefore, the district judge plainly did not show the type of bias that required his recusal under Section 455(b)(1). See also *United States* v. *Bond*, 847 F.2d 1233, 1241 (7th Cir. 1988); *United States* v. *Giorgi*, 840 F.2d 1022, 1035 (1st Cir. 1988); *United States* v. *Page*, 828 F.2d 1476, 1481 (10th Cir.), cert. denied, 484 U.S. 989 (1987).

Nor did the district court's knowledge of the escape plot require recusal under Section 455(a), which guards against the appearance of partiality. See *Liljeberg* v. *Health Serv-*

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[4] Petitioner argues (Pet. 26) that the courts of appeals have different standards that they apply to claims of judicial bias. The cases that petitioner cites, however, do not involve claims of recusal under Section 455, and some do not even involve questions of recusal at all. For example, *Menzies* v. *Procunier*, 743 F.2d 281 (5th Cir. 1984), was a collateral attack on a state conviction that dealt with the effect of improper prosecutorial argument. Similarly, *Houston* v. *Estelle*, 569 F.2d 372 (5th Cir. 1978), involved a prosecutor's improper comments at trial, not whether the trial judge should have recused himself. And *Battaglia* v. *United States*, 390 F.2d 256 (9th Cir. 1968), involved a trial judge's awareness of facts in a presentence report. The court held that the judge should either have admitted the report into evidence or should have disregarded its contents; there was no issue of disqualification under Section 455. The only two court of appeals decisions cited by petitioner that dealt with recusal were decided, not under Section 455, but on due process grounds. See *Dyas* v. *Lockhart*, 705 F.2d 993, 996-997 (8th Cir.), cert. denied, 464 U.S. 982 (1983); *Wilks* v. *Israel*, 627 F.2d 32 (7th Cir. 1980), cert. denied, 449 U.S. 1086 (1981).

ices Acquisition Corp., 486 U.S. 847 (1988); *United States* v. *DiPasquale*, 864 F.2d 271, 279 (3d Cir. 1988), cert. denied, 109 S. Ct. 3216 (1989); *United States* v. *Giorgi*, 840 F.2d at 1035-1036. We know of no support for the proposition that the court's knowledge of the possible escape plan was sufficient to give rise to an appearance of bias. We submit that the public would expect that a judge would be kept informed about security matters affecting his courtroom.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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NO. 89-1280

In the Supreme Court of the United States

October Term, 1989

SOCORRO GUERRA, PETITIONER

V.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY FOR THE UNITED STATES IN OPPOSITION

SOCORRO GUERRA
IN PERSONA
REG. NO. 19220-004
P.M.B. 7007
UNIT: SHAWNEE
MARIANNA, FLORIDA 32446

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SOCORRO GUERRA
IN PERSONA
REG. NO. 1922-044
P.M.B. 7007
UNIT: SHAWNEE
MARIANNA, FLORIDA 32446

QUESTION PRESENTED

Whether Due Process requires the recusal of a Judge where there is a likelihood or probability for bias, resulting from information learned in his judicial capacity in ex parte communication that threats against his life have been made by the defendant, and where Judge's findings of fact demonstrate an absence of judicial detachment.

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REPLY TO THE UNITED STATES BRIEF IN OPPOSI N

OPINIONS BELOW

The opinion of the court of appeals (App. B) . unpublished, but the decision is noted at 891 F 906 (table). The opinion of the district court (A . A) is unreported.

JURISDICTION

The judgment of the court of appeals was ent d on November 13, 1989. The petition for a writ of rtiora was filed on January 11, 1990. The jurisdicti of thi Court is invoked under 28 U.S.C. 1254(1).

ARGUMENT

Under both §144 and §455, the alleged bias or prejudice must be personal and it must stem from extrajudicial source which would result in an opinion on the merits of some basis other than what the judge learned from his participation in the case.[1] The statutes legislative history legion in its holding,[2] and mandatory.[3]

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1 Section §455(a) provides: a judge must disqualify himself in any proceeding in which "his impartiality might reasonably be questioned." Section §455(b)(1), a judge must also disqualify himself where he has a "personal bias or prejudice concerning a party." If the evidence shows that a "reasonable person" would harbor doubts about the judge's impartiality", the trial judge must disqualify himself. Potashnick v. Port City Constr. Co., 609 F2d 1101, 1111 (5th Cir.), cert. denied, 449 US 820 (1980).

2 28 U.S.C. §455 (1970) provides: Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein. 28 U.S.C. §455 (1964) & (1946)

3 A straight-forward reading of the statute suggests that at the time a judge is made aware of a disqualifying interest, he falls squarely into the mandatory directives of Section §455(b). Read this way, it appears that the lack of any specific mention in §455(b) of divestiture is relevant, since at that point the judge knows that he "has" an interest, the section directs the judge to step down. With respect to Section §455(b) disqualification, Congress's unequivocal language means that parties cannot waive disqualification. Section §455(b) serves to protect the "appearance" and "propriety" of the judical system. (1974).

In considering whether to hear a case where there is a possibility of judicial bias, the court should err on the side of recusal. Potanshnick v. Port City Construction Co., 609 F2d 1101, 111 (5th Cir.), cert. denied, 449 US 820 (1980).

Here as in Potashnick the judge's failure to disqualify himself constituted an abuse of sound judicial discretion; and reversal is warranted by failure to disqualify and improper rule does not apply to exonerate action. The goal of judicial disqualification statute is to foster "appearance of impartiality". Alleged bias and prejudice of a judge to be disqualifying must stem from an extra-judicial source and must result in opinion on merits on some basis other than what the judge learned within judicial capacity. However, establishment of the extra-judicial source of bias and prejuidce of judge is not required in order to disqualify a judge. A time limit has never been applied to a claim of personal and extra-judicial bias under §455(b).[4] Here both are met.

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[4] Davis v. Board of School of Comm'rs, 517 F2d 1044, 1051 (5th Cir. 1975), cert. denied, 425 US 944 (1976); see also United States v. Conforte, 624 F2d 869, 880 (9th Cir.) (statute is self-enforcing and duty to disqualify in on judge), cert. denied, 449 US 1012 (1980); SCA Services, Inc. v. Morgan, 557 F2d 110, 117 (7th Cir.) ("The provision of [§455] mandatory, they are addressed to the judge and require that he disqualify himself in certain circumstances."); Wolfson v. Palmieri, 396 F2d 121 (2nd Cir.)(1968) ("If there be a real doubt created as to prejudice of judge, that alone may be important factor to be considered by judge in determining whether he should withdraw").

Here there is reason to believe the "appearance of impartiality" that Judge Scott was prejudiced against the petitioner by the extrajudicial and personal communication with the F.B.I., U.S. Marshals, and United States Attorney's Office with placing Judge Scott under 24-hour security for an unknown duration. Disclosure to petitioner's counsel of the nature of an in-chambers conference with all others "of counsel" was to be favored especially when the conference involved a matter directly concerning petitioner. Soccorro was stigmatized by private testimony unconstrained by the rules of evidence and untempered by cross-examination. If not ineradicable from the judge's mind, this created, at least, a situation in which the judge's impartiality might reasonably be questioned.

The facts of this case as in Potanshnick presented a question of the "appearance of impartiality" to be convincing a reasonable man that a bias or prejudice existed of a personal nature as opposed to judicial. Hence review is limited to sufficiency and compliance with the statute and Due Process. In re Murchison, 349 US 133, 138 (1955); Withrow v. Larkin, 421 US 35, Dyas v.Lockhart, 705 F2d 993, (8th Cir.) cert. denied, 104 S.Ct. 424 (1983); Offutt v. United States, 348 US 11 (1954); Tumey v. Ohio, 273 US 510 (1927); Berger v. United States, 41 US 230 (1921); United States v. Grinnell Corp., 384 US 563 (1966); Liljeberg v. Health Services Aquisition Corp., 486 US 847 (1988); Gibson v. Berryhill, 411 US 488; Taylor v. Hayes, 418 US 57; United States v. Thomas, 299 F.Supp. 494 (E.D.Mo. 1968); Morris v. Lewis, 54 F2d 1022 (4th Cir.), cert. denied, 52 S.Ct. 640 (1932);

Davis v. Board of School Comm'rs of Mobile City, 517 F2d 1044 (5th Cir.)(1975); Reserve Mining Co. v. Lord, 529 F2d 181 (8th Cir.)(1976); Wolfson v. Palmieri, 396 F2d 121 (2nd Cir.)(1968); Marshall v. Jerrico, 446 US 238 (1982); Fed.R. Crim.P. 52(b); United States Constitution Amendment 5; 1974 U.S. Code Cong., & Admin. News, p. 6351, 6357; Advisory Committee on Judicial Activities, Advisory Opinion No. 58 (1978); Subcommittee on Improvements in Judiciary Machinery of the Senate Committee on the Judiciary, 93d Cong., 1st (July 1971 - May 1973) at 95; 13A C. Wright, A. Miller & Cooper, Federal Practice and Procedures §3541 (2d ed. 1984); Note, Disqualification of Judges & Justices in the Federal Courts, 86 Harv.L.Rev. 736 (1973); 28 U.S.C. §144 and §455; Potashnick v. Port City Const. Co., 609 F2d 1101 (5th Cir.) cert. denied, 425 US 944 (1976); Jaffee v. Grant, 793 F2d 1182.

The standard for judicial disqualification is whether a reasonable person, knowing all the circumstances, and "under a realistic appraisal of psychological tendencies and human weaknesses would harbor doubt about the judge's impartiality." Public respect for the legal system, as Congress and this Court have recognized, depends not only on doing justice, but also on demonstrating that the system operates fairly. In re Murchinson (quoting Offutt v. United States 348 US 11 (1954) in part:

> [Our] stringest rule may sometimes bar trial judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice".

The government's premise that the burden in upon the petitioner to demonstrate "cause and actual prejudice," rather than "plain error" of Rule 52(b) standard of review on a motion for collateral relief under 28 U.S.C. §2255 is ill-placed. This fails to be a case where the error was during a jury trial or a procedural default (challenge to jury instructions). Nor is it a case where the knowledge provided under "full disclosure" with all parites present in open court, including the witnesses and the petitioner. In Frady the judge was not the decision-making tribunal, but rather a jury. In Frady the defendant was present in open court privy to the information and afforded cross-examination of all the witntesses. In addition Frady warrants disregard to the fact-specific claim due to the information was learned during judicial capacity. United States v. Frady, 456 US 152 (1982)(emphasis added).

Here litigants were deprived of the entitlement to a judge whose unconscious responses in litigation that may be struck only in observing presence of all parties and their counsel and that right was impaired when party is required to meet in his opponent ad advocate who has already acted as judge's counsel in same litigation.

Petitioner contends that Judge Scott had a connection and relationship ex parte with the "counsel for the government" to the action. It is asserted, that his receiving counseling and extrajudicial information, who were presented by the U.S. Attorney's Office with the working relationship with the other governmental agengies, amounted to his being "counseled", or at least his having a relationship to or connection with attorneys

for the opposition's parties within the meaning of the statute. Thereby Judge Scott did sit in a "case" in which has had a relationship with "counsel" and/or in which he had a "substantial interest", within the congressional standards for mandatory disqualification.

This Court held that due process clause prohibits a criminal trial in which the judge "has a direct, personal, substantial, pecuniary interest in reaching a conclusion against [the defendant] in his case." Tumey v. Ohio, supra, In re Murchison, supra, United States v. Grinnell Corp., supra.

Here as in Reserve Mining Co. v. Lord, 529 F2d 181 (1976) the case demonstrates serious problems. The lower court's opinion demonstrates unsupported overt acts reflecting the "appearance" of bias against the defendant. In Reserve Mining Co. v. Lord the judge announced on the record that witnesses called by Reserve could not be believed, "that in every instance Reserve Mining Company hid the evidence, misrepresented, delayed and frustrated the ultimate conclusion". Id. In the instant case the judge's opinion was not announced on the record but rather in its written opinion after the conclusion with a higher degree of egregious remarks. (see App. "A"). Where the court has been a participate in ex parte communications that tend to exacerbate the culpability of the defendant or bear credibility to the defendant, the court should refer the case to another judge in order to assure the appearance, as well as the reality of fairness. Again, the instant case as in Reserve Mining Co. v. Lord, supra, the opinion rife with credibility determinations and findings of disputed facts not supported by record but by the extrajudicial knowledge

by beginning and ending with personal opinion as to Guerra's dangerousness, credibility, and character. Judge Scott thus became lawyer, witness and judge in the same proceeding, and abandons the greatest virtue of a fair and conscientious judge - impartiality. Here the tribunal had shed its robe of the judge and has assumed the mantle of the advocate.

"[T]ribunals of the country shall not only be impartial in the controversies submitted them but shall give assurance that they are impartial." The instant case is a situation in which the judge's impartiality might reasonably be questioned. Potashnick v. Port City Const. Co., 609 F2d 1101 (5th Cir.) cert. denied,449 US 820 (1980); 28 U.S.C. §144 and §455; U.S. Const. Amend. 5.

The government failed to submit any statute or case law in support that disqualification is not mandatory when the information was learned by extrajudicial sources. The case law submitted deal with knowledge learned in judicial capacity; and where the "full disclosure" was afforded, jury trials and as such as inapposite.

Here in direct contrast to the cases submitted by government, Judge Scott stated that be had been briefed on extrajudicial information directly bearing on the defendant (R.I. 339 p. 2) and failed to disclose to the parties the details of that briefing. The briefing was extrajudicial as opposed to knowledge obtained through judicial capacity. The government's contentions are without merit. United States v. DiPasquale, 864 F2d 271 (3rd Cir. 1988); Delesdernier v. Porterie, 666 F2d 116 (5th Cir.) cert. denied, 459 US 839 (1982); United States v. Frady, 456 US 152 (1982); United States v. Bond, 847

F2d 1233 (7th Cir.) (1988); United States v. Page, 828 F2d 1476 (10th Cir.) cert. denied, 484 US 989 (1987)1 Ogalala Sioux Tribe v. Homestake Mining Co., 722 F2d 1407 (8th Cir.)(1983); Phillips v. Amoco Oil Co., 799 F2d 1464 (11th Cir.)(1986) cert. denied, 481 US 1016 (1987).

Upon the opposition of the government during one of the writ of habeas corpus hearings, the petitioner's learned for the first time, that the allegation that an alleged Colombian "hit teams" planned to break into the courtroom without regard for the lives or safety of any person who may be present, including the presiding judge, was basis for the cancellation of the writ ad testificandum. Guerra's counsel requested an evidentiary hearing to be conducted on this issue to permit her to confront and cross-examine the parties for the government who purported these allegations, but her request was denied. (R.I. 340, 348) (R.I. 339 g. 4).

The instant case fails to fall within circumstances submitted by the government where the defendant had benefit of full disclosure of information learned within a judicial capacity; or where the extent of the impropriety were known placing it outside the boundaries of exceptional circumstances and subject to waiver. As such the cases are immaterial to the instant case. Ogalala Sioux Tribe v. Homestake Mining Co., supra, Phillips v. Amoco Oil Co., supra, United States v. Bond, supra, United States v. Page, United States v. Nobel, United States v. Giorgio, 840 F2d 1022 (1st Cir.)(1988); United States v. Frady, supra.

Applicable in a case which involves extrajudicial res judicata the determining factor was not whether the issue in question was litigated, but whether there was an opportunity to litigate the matter. Jaffe v. Grant, 793 F2d 1182 (11th Cir. 1986). Thus, a motion for recusal may not ordinarily be predicated upon the judge's ruling in the same or a related case. 28 U.S.C. §144 and §455; U.S. Const. Amend. 5.

The disqualification results from extrajudicial conduct rather than from a matter arising in a judicial context. The lack of "appearance" of impartiality is of the record in the opinion of the lower court stemming from the extra-judicial evidence received through ex parte methods is demonstrated by the absence of judicial attachment. Focus under the statute, which provides for disqualification of judge if his impartiality might reasonably be questioned, is on the objective appearance of bias, rather than bias-in-fact. 28 U.S.C. §455(a)

Facts which support disqualification were not discovered until after the post-conviction hearing had been concluded. Potashnick v. Port City Const. Co., 609 F2d 1101, 1108-15, (5th Cir.) cert. denied, 425 US 944 (1976).

In Potashnick, it was noted that §455 makes it the judge's duty to disqualify himself as soon as he is aware grounds exist. The mandate is made inexorable by express prohibition against waiver. The statute applies whenever the judge "acts as a lawyer" within the meaning of §455(b)(5)(ii) when he actually participated in the case. Here the evidence is of record that Judge Scott had participated in discovery by ex parte. Such participation, therefore, required recusal. Because disqualifcation cannot be waived, the issue is solely one of law.

The waiver section of §455 provides: "no . . judge . .shall accept from the parties to the proceedings a waiver on any grounds for disqualifcation enumerated in subsection (b). The provision is mandatory. They impose no duty on the parties to seek disqualification nor do they contain any time limits within disqualification must be sought. Moreover, although the Department of Justice recommended that the new section §455 should include some limitation of time "to prevent applications for disqualification from being near the end of a trial when the underlying facts were known long before." H.R.Rep. No. 1435, 93d Cong., 2d Sess 9 (1974) U.S. Code Cong. & Admin. News, 1974, p. 6358. Congress did not incorporate this recommendation in the statute. Because it is obvioius that any decision to deny disqualification based on grounds of waiver and estoppel would frustrate the purpose of the statute, the government's defenses to the petition are without merit. Davis v. Board of School Comm'rs of Mobile City, supra; U.S. Const. Amend. 5; 28 U.S.C. §144 and §455; Tumey v. Ohio, In re Murchison, supra, Marshall v. Jerrico, supra.

Here as in Potashnick, the ground was not discovered until the case concluded. There the court held that waiver was not possible since there had been no full and fair disclosure. Postashnick v. Port City Const. Co., supra.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

May 10, 1990

Jacopo Guerra